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Supreme Court of the United States

OCTOBER TERM, 1993

U.S. ANCHOR MFG., INC.,

Petitioner,

—v.—

RULE INDUSTRIES, INC., TIE DOWN, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF NEW YORK, ALABAMA, CONNECTICUT, FLORIDA, INDIANA, LOUISIANA, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, OHIO, PENNSYLVANIA, RHODE ISLAND, TENNESSEE, TEXAS, VIRGINIA AND WISCONSIN

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INTRODUCTION

The States of New York, Alabama, Connecticut, Florida, Indiana, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Nevada, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia and Wisconsin (hereinafter "Amici States") submit this brief in support of the petitioner's positions that:

1. In an attempted monopolization case under Sherman Act section 2, 15 U.S.C. § 2, a determination that the defendant did not have a 50% or greater share of the relevant market does not, as a matter of law, preclude a finding of dangerous probability of monopolization without regard to evidence concerning concentration in the relevant market, barriers to entry, defendant's capacity to cross-subsidize predation and any other relevant factors.

2. Establishing the requisite combination, contract, or conspiracy under Sherman Act section 1, 15 U.S.C. § 1, in a claim alleging an agreement to restrain trade by fixing prices that the petitioner charges are predatory, does not require antitrust plaintiffs to meet a heightened standard of proof on the issue of whether or not there was agreement.

INTEREST OF THE AMICI STATES

The Amici State Attorneys General are the chief law officers of their states and are charged with the duty to enforce the antitrust laws. The Attorneys General represent the citizens of their states as *parens patriae* in bringing federal antitrust actions for damages and injunctive relief.[1] They also represent the interests of the states and their political subdivisions in a proprietary capacity in federal antitrust actions, also for treble damages and injunctive relief. The Attorneys General are the primary public enforcers of their respective state antitrust laws, which are frequently interpreted in conformity with the Sherman Act. The states play a significant role in antitrust enforcement and thus have a substantial interest in ensuring that the federal antitrust laws are interpreted

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[1] 15 U.S.C. § 15c, known as the Hart-Scott-Rodino Antitrust Act, authorizes state Attorneys General to represent all natural person citizens of their states in antitrust actions under the Sherman and Clayton Acts and to recover treble damages; *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945) (common law *parens patriae*); *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972).

in accordance with the underlying Congressional policy, the prior decisions of this Court and sound competition policy.

The Attorneys General also have a vital interest in preventing an unwarranted narrowing of the definition of the dangerous probability of success element in attempted monopolization cases. State Attorneys General have brought significant multistate cases against firms for monopolization and attempted monopolization.[2] Additionally, the proper standard for proving a contract, combination or conspiracy under section 1 of the Sherman Act is of great concern to the Attorneys General. Individually and collectively, the Amici States have brought numerous actions under section 1, or analogous state antitrust statutes, challenging horizontal and vertical agreements to fix prices and restrain trade.[3] The position adopted by the Eleventh Circuit could, by raising the standard of proof of the agreement element, protects anticompetitive conduct. Such a result would allow anticompetitive conduct that harms the Amici States and their consumers to flourish.

The Amici States are committed to ensuring that their citizens and governmental entities enjoy the benefits of free competition. The issues involved in this case are of major importance to the promotion of competition. For the reasons stated herein, the Amici States urge this Court to grant the petition for a writ of certiorari.

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[2] *New York v. Primestar Partners, L.P.*, No. 93 Civ. 3868 (S.D.N.Y. Final Judgment Sept. 14, 1993) (45 states and District of Columbia challenged, under Sherman Act sections 1 and 2, alleged restraints on the development of direct satellite broadcast of programming); *New York v. VISA U.S.A., Inc.*, CV-89-5043 (PNL) (S.D.N.Y. Final Order 1990) (14 states challenged, under Sherman Act sections 1 and 2 and Clayton Act section 7, a joint venture by potential issuers of point of sale debit cards).

[3] *E.g., In re Insurance Antitrust Litigation*, 113 S.Ct. 2891 (1993); *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065 (2d Cir. 1988); *Maryland v. Mitsubishi Electronics America, Inc.*, 1992-1 Trade Cas. [CCH] ¶ 69,743 (D.Md. 1992); *New York v. Nintendo of America, Inc.*, 1992-2 Trade Cas. [CCH] ¶ 69,513 (S.D.N.Y. 1991).

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Determination That The Dangerous Probability Of Success In An Attempted Monopolization Case Is Determined Solely By Market Share Is In Conflict With Decisions By This Court And With Other Circuits

The Eleventh Circuit failed to follow the teaching of this Court's most recent attempted monopolization case, *Spectrum Sports*, 113 S.Ct. 884 (1993), which requires an analysis of the defendant's actual economic power in a market, contrary to the Eleventh Circuit's mechanistic application of market share screens.[4]

The elements of attempted monopolization are (1) a specific intent to monopolize a relevant market, (2) predatory or exclusionary conduct to accomplish the result and (3) a dangerous probability of success. *Spectrum Sports, Inc. v. McQuillan*, 113 S.Ct. 884 (1993); *Loraine Journal v. United States*, 342 U.S. 143 (1951).

In assessing whether the petitioner had met its burden of proving that the respondent had a dangerous probability of successful monopolization, the Court of Appeals held:

> Accordingly, because [respondent] Rule possessed less than 50% of the market at the time the alleged predation began and throughout the time when it was alleged to have continued, there was no dangerous probability of success in October 1985 as a matter of law.

Pet. App. 34a.

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[4] *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S.Ct. 2072, 2082 (1992) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.").

This requirement of a specific market share is in conflict with the decisions of this Court and with other Circuits.[5] As this Court has made clear, in order to demonstrate that the defendant has a dangerous probability of succeeding in its monopolistic goal, the plaintiff must define the relevant market and show that the defendant has some power in that market.[6] *Spectrum Sports*, 113 S.Ct. at 890 (1993). Monopoly power is "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). Although "[t]he existence of [monopoly] power ordinarily may be inferred from the predominant share of the market," *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966), share of the market is not the only relevant factor in determining whether market power exists. *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974) (Clayton Act section 7 case).[7]

Moreover, in an attempted monopolization case, the plaintiff is not required to show that the defendant actually possessed monopoly power, only that it had a dangerous probability of achieving it. *Swift & Co. v. United States*, 196 U.S. 375 (1905); *American Tobacco Co. v. United States*, 328

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[5] The Eleventh Circuit failed to follow its own precedent concerning attempted monopolization, *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989) (Recognizing that barriers to entry and other factors are relevant.).

[6] P. Areeda & D. Turner, III *Antitrust Law* ¶ 835a at 346 (1978) (the "dangerous probability" element "does not require significant preexisting market power" but simply a finding that the market share plus the anticompetitive conduct "may result in monopoly.").

[7] "In applying the statutory language that is the basis of relevant product market analysis, the Supreme Court has expressly stated that there is no distinction between 'line of commerce' of § 7 of the Clayton Act, 15 U.S.C. § 18 (1976), and 'part of commerce' of § 2 of the Sherman Act, 15 U.S.C. § 2. *United States v. Grinnell Corp.*, 384 U.S. 563, 573 (1966)." Robert L. Hubbard, Note, *Potential Production: A Supply Side Approach for Relevant Product Market Definitions*, 48 Ford. L. Rev. 621, 622 n.6 (1980).

U.S. 781, 785 (1946).[8] A defendant may be liable for attempted monopolization even though the attempt did not succeed. *United States v. American Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985) (defendant liable for attempted monopolization by inviting another competitor to fix prices, though the plan was impossible to execute because the invitee did not agree).

The defendant's market share is *a* factor relevant to the third element of the offense of attempted monopolization, that is, whether or not there is a dangerous probability that the attempted monopolization is likely to succeed. However, a firm's market share alone does not necessarily provide an accurate picture of its power in the relevant market. Market shares must be viewed in the context of "a company's future ability to compete." *General Dynamics Corp.*, 415 U.S. at 501-02. Similarly, in last term's section 2 case, this Court stated "demonstrating the dangerous probability of monopolization in an attempt case also requires inquiry into the relevant product and geographic market and the defendant's economic power in that market." *Spectrum Sports*, 113 S.Ct. at 892 (1993). Share of a relevant market is one, but not the sole, indicator of economic power in a market.[9] Other critical factors, including barriers to new entry, *United States v.*

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[8] "Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. . . . But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result." *Swift*, 196 U.S. at 396 (citation omitted).

[9] In resolving market or "monopoly" power issues, the courts have typically relied on market definition and on the defendant firm's share of the market thus defined. . . . Nevertheless, market definition has one serious limitation as a method for determining market power.

. . . .

United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954), and the competitive structure of the industry, *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948),[10] must be considered in assessing whether market share is an accurate representation of market power.

The Eleventh Circuit's adoption of a 50% market share screen for attempted monopolization cases thus conflicts with the letter and spirit of prior decisions of this Court concerning the weight and use of market share data. The decision also conflicts with decisions of other circuits holding that a defendant's market share is an inadequate measure of its market power and that a review of other factors in section 2 cases is required.[11] Thus, the Fifth Circuit, *Domed Stadium Hotel v.*

> All methods of power assessment raise difficult problems of proof and judgment. Market definition (and its resultant market-share calculation) has the additional disadvantage of being insufficient to establish the degree of market power that a firm possesses. One could have a substantial degree of market power even though he accounts for well below 100 percent of sales of a specified product. And the power of a firm accounting for, say, 80 percent of sales of a particular product may be very high or negligible, depending upon the demand for the product and upon the supply elasticity of existing competitors and the intensity of barriers to entry by others.

P. Areeda & D. Turner, II *Antitrust Law* ¶ 507 at 330 (1978) (footnote omitted).

[10] "The relative effect of the percentage command of a market varies with the setting in which that factor is placed." *Columbia Steel* at 528.

[11] Moreover, the Eleventh Circuit set the minimum market share above the levels that have been accepted by other Courts of Appeal as sufficient to prove actual, as compared to attempted, monopolization. *Movie 1 & 2 v. United Artists' Communs.*, 909 F.2d 1245 (9th Cir. 1990) (possession of 45% to 70% could indicate monopoly power, and 70% and 90% shares of relevant markets at a minimum raised a question of fact); *Reazin v. Blue Cross & Blue Shield of Kansas*, 899 F.2d 951 (10th Cir 1990) (45% to 60% market share does not prohibit a finding of monopoly power as a matter of law); *Hayden Pub. Co. v. Cox Broadcasting Corp.*,

Holiday Inns, 732 F.2d 480, 490 (5th Cir. 1984), noted that "a share of less than the fifty percent generally required for actual monopolization may support a claim for attempted monopolization if other factors such as concentration of market, high barriers to entry, consumer demand, strength of the competition, or consolidation trend in the market are present."[12] *See also, Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980, 991 (5th Cir. 1983) (Defendant liable for attempted monopolization though its market share dropped from 80% to about 38%). Similarly, the Second Circuit has adopted a host of factors that must be considered in addition to the defendant's share of the market. *International Distribution Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786 (2d Cir. 1987). These "market characteristics" include "the strength of the competition, the probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct and the elasticity of consumer demand." *Id.* at 792.[13] The Sixth Circuit, in *White & White, Inc. v. American Hospital Supply Corp.*, 723 F.2d 495 (6th Cir. 1983), employed a similar comprehensive analysis rather than relying solely upon market share. The court stated that the test of dangerous probability of success "clearly mandates a comparison of the defendant's size, performance and policies to that of other competitors *and* analysis of the market structure." *Id.* at 507 (emphasis in original). The Sixth Circuit specifically cited two factors as important to analyzing whether a defendant is

730 F.2d 64 (2d Cir. 1984) (stating that a party may have monopoly power in a market although its share of the market was less than 50%).

[12] The Fifth Circuit has also observed that courts "must be particularly wary of the numbers game of market percentage when considering an 'attempt to monopolize' suit." *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 n.2 (5th Cir. 1969).

[13] In an actual monopolization case, the Second Circuit stated that "We do not doubt the significance of market share evidence as an indicator of either the presence or absence of monopoly. As the cases and commentators have cautioned, however, the true significance of market share data can be determined only after careful analysis of the particular market." *Broadway Delivery Corp. v. United Parcel Service of America, Inc.*, 651 F.2d 122, 128 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981).

"seeking to monopolize the older, dying, smaller market" or is "an emerging competitor in the new, developing, larger market." *Id.* These factors include the ease with which new competitors could enter the market and any past or recent changes in the structure of the industry. Finally, the Tenth Circuit, too, has demanded consideration of all relevant factors, including "number and strength of the defendant's competitors, the difficulty or ease of entry into the market by new competitors, consumer sensitivity to change in prices, innovations or developments in the market, whether the defendant is a multimarket firm, as well as other evidence." *Shoppin' Bag of Pueblo, Inc. v. Dillon Cos.*, 783 F.2d 159, 162 (10th Cir. 1986).

II. The Eleventh Circuit's Heightened Standard Of Proof Requirement To Establish A Price Fixing Conspiracy Under Section 1 Of The Sherman Act Conflicts With This Court's Prior Opinions

The Eleventh Circuit's second error was in changing the settled law of the proof required to establish an antitrust conspiracy, creating an unprecedented "heightened standard" for cases that include, but are not necessarily limited to, allegations of agreements to restrain trade by fixing prices at levels alleged to by predatory, in violation of Sherman Act section 1, 15 U.S.C. § 1.

The Court of Appeals did not cite controlling authority for its "heightened standard" of proof. The court stated:

> . . . there is insufficient evidence linking Tie Down to Rule's efforts to support a finding of conspiracy between them. Federal antitrust law requires a plaintiff to introduce evidence that tends to exclude the possibility that the defendants acted independently or legitimately. . . . *see also Monsanto Co. v. Spray-Rite Service Co.*, 465 U.S. 752, 764 (1984) U.S. Anchor did not meet this heightened standard of proof."

Pet. App. 36a.

The Eleventh Circuit failed to identify what "lower" standard against which it compared the "heightened" standard for federal antitrust conspiracies. Moreover, the Eleventh Circuit referred to only part of the *Monsanto* language, ignoring this Court's full statement that an agreement may be proved by "direct or circumstantial evidence that reasonably tends to prove that the [conspirators] had a conscious commitment to a common scheme designed to achieve an unlawful end." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984). If the Eleventh Circuit's adoption of a "heightened standard" is not corrected, it may affect future Sherman Act section 1 conspiracy cases, which represent the majority of antitrust cases brought by Attorneys General, especially in the Eleventh Circuit.

A. This Court Has Not Created A Heightened Standard Of Proof For Contract, Combination Or Conspiracy

It is axiomatic that the elements of a Sherman Act section 1 violation include (1) a contract, combination or conspiracy among two or more entities, (2) that unreasonably restrains trade, and (3) affects interstate or foreign commerce.[14] ABA Antitrust Law Section, I Antitrust Law Developments 3d 2 (3d ed. 1992).

An antitrust conspiracy is "a unity of purpose or common design and understanding, or a meeting of minds in an unlawful arrangement," *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). Such illegal conspiracies may be express, *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), or implied, *United States v. General Motors Corp.*, 384 U.S. 127, 142-43 (1966).

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[14] In addition, the plaintiff must demonstrate "antitrust injury", that its injury was caused by conduct that the antitrust laws were enacted to prevent. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

To the extent that the Eleventh Circuit believed that *Monsanto* announced a new, heightened, standard for proof of conspiracy in antitrust cases, it is simply wrong. In *Monsanto*, this Court held that "[t]he correct standard is that there must be evidence that tends to exclude the possibility of independent action by the [parties]. That is, there must be direct or circumstantial evidence that reasonably tends to prove that [the parties] had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 768. On a motion for summary judgment, this Court explained that the plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently. . . . [R]espondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of competing inferences of independent action or collusive action that could not have harmed respondents." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). Finally, this Court has stated that *Matsushita's* requirement "that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases", noting that the requirement "was not invented, but merely articulated, in that decision." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 U.S.2072, 2083 (1992).[15]

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[15] Moreover, antitrust scholars Areeda and Hovenkamp state:

> It is important not to be misled by *Matsushita's* statement, which restated *Monsanto*, that the plaintiff's evidence, if he is to prevail, must "tend . . . to exclude the possibility that the alleged conspirators acted independently." The Court surely did not mean that the plaintiff must disprove all non-conspiratorial explanations for the defendants' conduct. Not only did it use the word "tend," but the context made clear that the Court was simply requiring sufficient evidence to allow a reasonable factfinder to infer that the conspiratorial explanation is more likely than not.

P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 1405 at 1021 (1993 Supp.). In adopting the heightened standard of proof, the Eleventh Circuit evidently was misled to misinterpret this Court's precedents.

Here, the jury could have found such an agreement in evidence of respondent Tie Down's written proposal that respondent Rule cut prices to cause petitioner U.S. Anchor to incur losses, Rule's implementation of those prices and sales at prices below its costs, according to the record. Pet. App. 8a, 107a.

B. The Eleventh Circuit's Decision Conflicts With This Court's Decisions Holding Price Fixing *Per Se* Illegal

Per se illegal restraints of trade are those which are so unambiguously anticompetitive that they are illegal as a matter of law. Stating that horizontal price fixing agreements had been "unlawful *per se*" for more than 40 years, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-23 (1940), this Court held that "[a]ny combination which tampers with price structures is engaged in an unlawful activity. . . . Congress has not left with us the determination of whether or not particular price schemes are wise or unwise, healthy or destructive."

Neither the reasonableness of the prices fixed, nor the alleged intentions, nor any alleged business reasons for the conspiracy are defenses to price fixing. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 348-49 (1982); *Socony-Vacuum*, 310 U.S. at 222-24; *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 461 (1940). Prices are fixed, within the prohibition of the Sherman Act, "because they are agreed upon." *Socony-Vacuum*, 310 U.S. at 222.

Vertical price fixing has been *per se* unlawful for more than 80 years, *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911).

Minimum, as well as maximum, price fixing is *per se* illegal. *Albrecht v. The Herald Co.*, 390 U.S. 145 (1968) (adhering to *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), and holding that maximum retail price fixing is as unlawful as minimum resale price fixing.);

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) (assuming arguendo that maximum resale price fixing is *per se* illegal).

C. The Eleventh Circuit's Decision Conflicts With This Court's Standard Of Review For Claims Alleging Pricing At Predatory Levels

In this case, the anticompetitive conduct alleged to violate section 1 of the Sherman Act was an agreement to restrain trade by fixing prices, which the plaintiff alleged were set at predatory levels. The Eleventh Circuit held that there is a heightened standard for proof of conspiracy in such cases, which specifically required evidence that both of the conspirators knew that the prices set were actually predatory in order to have conspired. In so holding, the Court of Appeals incorrectly merged two of the elements of a Sherman Act section 1 violation: whether there was an agreement and whether that agreement unreasonably restrained trade. As the Amici States have discussed, above, the jury found that the petitioner presented evidence sufficient for it to find a conscious commitment to a common scheme, an agreement, satisfying the first element of a section 1 cause of action. *See* Pet. App. 87a.

The second element of the section 1 cause of action is whether or not the agreement is an unreasonable restraint of trade. The Court of Appeals found that the evidence considered by the jury was "sufficient to show an intent to achieve an unlawful objective on Rule's part, namely, the use of predatory means to monopolize the fluke anchor market." Pet. App. 36a. In its most recent case concerning predatory pricing, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S.Ct. 2578 (1993), this Court enunciated the requirements for proving claims concerning predatory pricing.[16] This Court concluded that "[t]hese prerequisites to

[16] Two elements are required to prove a Section 2 predatory pricing claim: (1) the predator's prices must be below an appropriate measure

recovery are not easy to establish, but they are not artificial obstacles to recovery; rather, they are essential components of real market injury." *Brooke Group*, 113 S.Ct. at 2589. The Eleventh Circuit's "heightened standard" for proof of agreement to restrain trade by fixing prices at levels alleged to be predatory is just such an artificial obstacle; a standard designed to defeat such claims rather than the essential component of actual market injury required by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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of its own costs, and (2) the plaintiff must show that the predator has a "dangerous probability of recouping its investment in below cost prices." *Brooke Group*, 113 S.Ct. at 2587-88 (1993).